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Supreme Court, U.S.
FILED
MAY 22 1998
OFFICE OF THE CLERK

No. 97-1731

In The

Supreme Court of the United States

October Term, 1997

GARY W. BOWEN,

Petitioner,

v.

KEITH OISTEAD; UNITED STATES OF AMERICA; HUGH L. COX III; DAN E. DENNIS; KENNETH M. TAYLOR; STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in holding that the doctrine of intra-military immunity and nonjusticiability, deriving from this court's opinion in *Feres v. United States*, 340 U.S. 135 (1950), required dismissal of petitioner's suit for damages brought against the Alaska National Guard and petitioner's superior officers in the Alaska National Guard.

2. Whether the District Court, and the Court of Appeals, lacked jurisdiction over the claims in Bowen's complaint against the Alaska National Guard and Bowen's superior officers in the Alaska National Guard.

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STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Facts

In June, 1984, Gary Bowen was appointed to full time duty with the Alaska Air National Guard in an Active Guard/Reserve ("AGR") position. In this position he was tasked to perform the duties of staff judge advocate at the Headquarters of the Alaska National Guard. Over time Bowen achieved the rank of Major in this position. His status in the AGR program was last continued (by orders dated in April, 1991) to June 3, 1996 "unless sooner relieved by competent authority." He was "relieved" by the Adjutant General of the Alaska National Guard and terminated from his AGR position in May of 1993.

The AGR program is authorized by act of Congress in 32 U.S.C. § 502(f). This statute allows a member of the National Guard to be ordered to full-time duty above and beyond the part-time duty normally required of a regular member of the National Guard.[1] The statute mandates, however, that the appointment be made pursuant to "regulations . . . prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be . . . " *Id.* The Secretary of the Air Force through the promulgation of Air National Guard Regulation 35-03 has prescribed detailed rules governing AGR status. ANGR 35-03 (June

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[1] Regular members of the state National Guard serve only part-time, assembling on weekends (up to 48 times in a year) and participating in training exercises at least 15 days in a year. 32 U.S.C. § 502(a). The AGR program was created to provide full-time military support personnel to assist in the administration of the state National Guard. Petitioner's Appendix 3

1989). Among other things, members of the program are paid by the federal government through the Joint Uniform Military Pay System (JUMPS), they are precluded from receiving state pay or benefits and they are limited in the time and circumstances under which they may be placed on active duty for the state. *Id.* Portions of this regulation also deal comprehensively with the separation-termination of AGR personnel. *Id.*

Additionally, the Department of the Army and the Air Force, have jointly promulgated regulations articulating more specifically the mission and functions of officers, like Bowen, who are in the full-time AGR Judge Advocate Program. According to these regulations,

> The primary mission of full-time AGR Judge Advocates . . . is to provide legal advice and services to the State Adjutants General and their staffs, subordinate ARNG and ANG elements, and the United States Property and Fiscal Officers (USPFO), on matters in which there is a substantial *federal interest*.

NGR (AR) 27-19/NGR (AF) 110-6, para. 3 (July 1990) (emphasis added).

In 1992, Bowen, in his capacity as staff judge advocate in the AGR program, was ordered to work on implementation of a military justice system for the Alaska National Guard. Bowen's immediate supervisor on this project was Colonel Jerry W. Gillean, a member of the Alaska National Guard and also a full-time federal employee under the Air National Guard Technician Act, 32 U.S.C. § 709(d). In February, 1993, Colonel Gillean formally notified Bowen that he intended to recommend Bowen's involuntary termination from the Active Guard/

Reserve program to the Alaska Adjutant General. Gillean cited specific instances of misconduct in support of his recommendation that he, Gillean, asserted had breached the trust between Bowen and the leadership of the Alaska National Guard and "further eroded the relationship that should exist" between the Guard leadership and the staff judge advocate. Gillean's recommendation along with Bowen's written response was passed up the chain of command for review in accordance with the procedures outlined for termination of an AGR officer in ANGR 35-03. Ultimately, the recommendation reached the Alaska Adjutant General, Hugh Cox, who reviewed the written recommendations and Bowen's responses. The Adjutant General then approved the recommendation for termination of Bowen from his tour of duty in the AGR program.

B. Nature of the Case and Course of Proceedings Below

Bowen originally filed this suit for damages in the Superior Court (trial court) for the State of Alaska in May of 1995, approximately two years after his termination. The defendants included not only the Alaska National Guard officers who participated in the process leading to his termination (Cox, Dennis, Taylor and Oistead) but also a number of commissioned officers on active duty with the United States Air Force as attorneys in the Judge Advocate General Branch (King, Sigmond, Williams, Pearson and Gamboa). Col. Gillean, an officer in the Alaska National Guard and a federal technician-employee under the National Guard Technician Act, 32

U.S.C. § 709(d), was also named as a defendant. In the complaint Bowen broadly alleged common law torts of defamation, misrepresentation and interference with contract as well as constitutional torts, under both the federal and state constitutions, of denial of equal protection and violation of due process. Bowen also claimed that his superior officers and the State of Alaska breached his employment contract as a staff judge advocate in the AGR program and wrongfully terminated him without just cause. Finally, a civil claim under 18 U.S.C. §§ 1961-1968 (RICO) was asserted.

After appropriate inquiry, Robert C. Bundy, United States Attorney for the District of Alaska, certified that Col. Gillean, as well as the active duty Air Force officers who had also been named as defendants, were employees of the United States acting within the scope of their employment at all times relevant to the events outlined in Bowen's complaint. Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 23 U.S.C. § 2679(d)(1), the United States was then substituted in place of these defendants and by motion made under 28 U.S.C. § 1446(d), the entire case was removed to the Federal District Court for the District of Alaska.

In the federal district court the defendants filed motions to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. The Alaska National Guard defendants based their motion on nonjusticiability under *Feres v. United States*, 340 U.S. 135 (1950), and its progeny, failure to exhaust intra-military administrative remedies and the lack of a property interest in employment in an AGR position sufficient to require due process

protection or just cause for termination. The federal status defendants' motion was based primarily on *Feres* immunity.

The district court granted these motions and dismissed the complaint in its entirety. Petitioner's Appendix 16-27. The district court agreed with the Alaska National Guard defendants and the federal status defendants that the *Feres* doctrine, as applied in such cases as *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988) and *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995), immunized these defendants (and their respective military employers) from suit on the claims asserted by Bowen. The district court also concluded that Bowen had failed to state a RICO claim. A judgment was entered dismissing the action. Bowen then filed a notice of appeal.

The Ninth Circuit affirmed the district court's dismissal as to all defendants. Relying on *Feres* and subsequent opinions by this court clarifying the reach of the *Feres* doctrine, the Ninth Circuit held that the *Feres* rule applies not only within the active federal military structure but, with equal force, to the state National Guards and their military members. The Ninth Circuit observed that "the overwhelming weight of authority" supported this holding and that the case law:

> implicitly [recognizes] that the military apparatus of the United States cannot be divided into strictly state and federal components . . . *Feres* applies to the state National Guards and their members due to the integral role they play as part of the nation's defense force and the substantial degree to which the state National Guards are financed, regulated and controlled

> by the federal government even when not called into active federal service.

Petitioner's Appendix 10-11. The decision below then assessed Bowen's claims under the "incident to service" test mandated by *Feres*, 340 U.S. at 146, and had "no trouble concluding that the personnel decisions" that were at the heart of Bowen's complaint and gave rise to his claims were made incident to service. Petitioner's Appendix 11.

Long before filing this lawsuit for damages in the state trial court in May of 1995 Bowen had, promptly after his termination from AGR status, pursued his state administrative remedies by filing an appeal with the Alaska courts. This was not a suit for damages. It was an administrative appeal of the Alaska National Guard's decision to terminate Bowen from AGR status. Petitioner's Appendix 28-31. The central issue was whether Bowen was entitled to a hearing consistent with due process as mandated under state law. *Id.*, at 29. The Alaska Supreme Court ruled that such a pretermination hearing was required and remanded the matter back to the agency for the purposes of conducting such a hearing. *Id.*, at 59. The state court decision did not inquire into the merits of Bowen's factual allegations or authorize a lawsuit remedy. It simply ordered a pretermination hearing consistent with state due process.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S PRIOR RULINGS OR THE ACTS OF CONGRESS AND IS NOT IN CONFLICT WITH THE RULING OF THE ALASKA SUPREME COURT.

The decision below by the Ninth Circuit Court of Appeals is consistent with all other federal circuit courts of appeal in its application of the doctrine of intra-military immunity to damage[2] suits by members of the National Guard against other guard members or the state National Guard itself. *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993) (action by National Guard technician against Maine Air National Guard officer under federal civil rights law, federal whistleblower statute and state whistleblower law); *Jordan v. National Guard Bureau*, 799 F.2d 99 (3rd Cir. 1986) (damage claim by National Guard technician against federal armed services, state national guard and

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[2] Two of the circuits appear to recognize a limited exception to intra-military immunity-nonjusticiability for equitable claims for injunctive relief, as opposed to claims for damages. *Jordon v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986); *Walden v. Bartlett*, 840 F.2d 771, 774-775 (10th Cir. 1988). More recent authority, however, convincingly rejects such an exception to the *Feres* rule. *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008-1011 (8th Cir. 1989); *Introini v. South Carolina National Guard*, 828 F. Supp. 391, 395 (D.S.C. 1993); *Becker v. Rice*, 827 F. Supp. 589 (W.D. Ark. 1993); *Banks v. United States*, 797 F. Supp. 984, 986 (M.D. Ga. 1992), *aff'd*, 998 F.2d 1023 (11th Cir. 1993); *Williams v. Colorado National Guard*, 821 P.2d 922, 925 (Col. App. 1991); *see also Crawford v. Texas Army National Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986). Bowen has never argued that an injunctive relief exception applies to his complaint and for good reason – it is a claim primarily for damages.

guard officer under federal civil rights statutes and state common law of defamation); *Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987) (action by National Guard technician against his superior officers in the Louisiana Air National Guard under federal civil rights statute, Federal Tort Claims Act and state law); *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993) (federal civil rights damage claim by member of Active Guard Reserve Program in Wisconsin Air National Guard against WIANG and State Adjutant General); *Uhl v. Swanstrom*, 79 F.3d 751 (8th Cir. 1996) (damage action by National Guard technician against Iowa Air National Guard, Adjutant General of IANG and his commanding officer in IANG based on federal law and state common law); *Lovell v. Hang*, 890 F.2d 63 (8th Cir. 1989) (damage claim by guardsman in Active Guard Reserve position in Nebraska National Guard against Adjutant General and other NANG officers); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988) (Colorado Army National Guard technician damage suit against officer of CARNG under federal civil rights statute).

In these cases the circuit courts, like the Ninth Circuit in its decision below, have followed the opinions of this court beginning with the holding in *Feres v. United States*, 340 U.S. 135, 146 (1950), that members of the armed services could not sue the government for injuries that "arise out of or are in the course of activity incident to service." *Feres* involved negligence claims against the United States by, or on behalf of, members of the federal armed services who were injured while on active duty. Subsequent decisions by this court have clarified that the *Feres* rule does not turn on the tortfeasor's military status

but strictly on whether an injury arose out of "an activity incident to [the plaintiff's] military service," *United States v. Johnson*, 481 U.S. 681 (1987) (Feres held to bar claim by Coast Guardsman's estate based on claim of negligence of civilian air traffic controller employed by FAA), that the rule bars constitutional torts as well as common law tort claim, *Chappell v. Wallace*, 462 U.S. 296 (1983), and extends to all activities performed incident to service without reliance on officer/subordinate distinctions, *United States v. Stanley*, 483 U.S. 669 (1987).

In support of the petition Bowen relies heavily on *Perpich v. Department of Defense*, 496 U.S. 334 (1990), for the proposition that the state National Guard and the federal armed services are distinct organizations. The Ninth Circuit, Bowen argues, ignored this distinction and, in applying the *Feres* doctrine to his claims against the state National Guard, violated the constitutional separateness of the two forces. Therefore, as this argument goes, the need and the propriety to granting the petition.

Perpich, however, does not affirm the state National Guard's *independence* from federal regulation even when "the state militia hat is being worn." *Id.*, at 348. To the contrary, while *Perpich* acknowledges the dual enlistment system established by Congress, it reasserts "the supremacy of federal power in the area of military affairs." *Id.*, at 351. The decision below simply applies the same standard of intra-military immunity to damage claims by national guardsmen as that which applies in the federal armed services. Given the federal supremacy in military affairs, the extensive involvement of the federal government in providing the funding, the material and the leadership for state National Guard units, and the critical role these

forces play in the nation's defense, this application of the doctrine of intra-military immunity does not deprive the states of any significant degree of control over the state militia.

As to the Alaska Supreme Court's decision in Bowen's administrative appeal of the Alaska National Guard's decision to terminate him, there may be some conflict in the reasoning between what is articulated in parts of the Alaska court's decision and what can be found in the decision below by the Ninth Circuit, but there is no conflict in the holdings. The Alaska Supreme Court was called upon to make a determination as to whether the administrative process that was afforded to Bowen under ANGR 35-03, as it had been interpreted and implemented in Bowen's termination from his AGR position, needed to comply with due process under state law, i.e., whether an adversarial, pretermination hearing was required. Ultimately, the state court ruled that a pretermination hearing in accordance with state law was required, and was in fact contemplated under ANGR 35-03. The matter was then remanded to the state National Guard for a pretermination hearing of this nature. The state court decision did not authorize or approve a lawsuit for damages by Bowen against the Alaska National Guard or any of its officers and it did not authorize an independent inquiry by the state courts into the merits of Bowen's factual allegations. Under these circumstances there is no conflict on an important federal question between the state court and the court below. *See Cuyler v. Adams*, 449 U.S. 433 (1981); *Katzinger Co. v. Chicago Mfg. Co.*, 329 U.S. 394 (1947).

II. THE DISTRICT COURT AND THE COURT OF APPEALS DID NOT LACK JURISDICTION OVER THE CLAIMS AGAINST THE STATE OF ALASKA AND ITS EMPLOYEES.

The dismissal of the claims against the federal defendants did not extinguish the district court's jurisdiction and require remand to state court as to the state or non-federal defendants. *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 158-160 (5th Cir. 1982); *Watkins v. Grover*, 508 F.2d 920, 921 (9th Cir. 1974). Bowen's reliance on *Employees v. Missouri Public Health Department*, 411 U.S. 279 (1973), is misplaced. *Employees v. Missouri Public Health Department* involved the doctrine of sovereign immunity which protects an unconsenting State from a suit initiated in federal courts by its own citizens.

The district court's failure to remand this suit as to the Alaska National Guard and its officers was not an abuse of discretion. The issue to be determined, the application of the *Feres* doctrine of intra-military immunity to the state National Guard, is, as the Ninth Circuit recognized in its decision below, grounded in the essential role the state National Guards play as a part of the nation's defense forces and the extensive degree of federal involvement in financing and affirmatively regulating these units even when they have not been called into active federal service. It was clearly appropriate that this issue be litigated in federal court. In any event, the district court's refusal to remand under a discretionary standard, and the Ninth Circuit's implicit affirmance of the decision, is not a "compelling" basis for granting the petition. United States Supreme Court Rule 10.

III. BOWEN HAS WAIVED THE ARGUMENT THAT THE *FERES* DOCTRINE CANNOT BE APPLIED WITHOUT AFFORDING THE SAME REMEDIES TO THE MILITIA AS ARE AFFORDED MEMBERS OF THE REGULAR MILITARY AND IN ANY CASE THE PETITION SHOULD NOT BE GRANTED ON THIS BASIS.

Bowen did not make an argument to the Ninth Circuit that *Feres* should not extend to the state National Guards because the administrative remedies available to active duty servicemen are broader than those available to members of the state militia. Consequently, he has waived this issue and cannot now present it as a basis for review. There is simply no evidence on this issue and the broad conclusions stated in Bowen's petition on this point are unsupported by the record. It would be inappropriate to grant the petition where these issues and the pertinent facts are undeveloped and speculative.

IV. BOWEN DOES HAVE ADMINISTRATIVE REMEDIES AND IN ANY CASE THE IMPACT OF THE DECISION ON HIM IS NOT COMPELLING REASON TO GRANT THE PETITION.

Although the Ninth Circuit's opinion does preclude Bowen's suit for damages and equitable relief directly against the Alaska National Guard and his superior officers in the Alaska National Guard, he does have an administrative remedy, one that has been confirmed by the Alaska Supreme Court. Petitioner's Appendix 28-59. He has pursued this administrative remedy and obtained an order remanding his termination back to the Alaska

National Guard for purpose of conducting a pretermination hearing that comports with due process under state law. Additionally, Bowen may as well have administrative remedies on the federal military side with the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1552 and 32 C.F.R. § 865, and the Air Force Discharge Review Board (AFDRB) under 10 U.S.C. § 1553 and 35 C.F.R. § 865.100.

In any case the personal impact on Bowen of the decision below is not a basis for granting this petition.

V. THE INTEGRITY OF THE JUDICIAL PROCESS IS NOT IMPLICATED AND DOES NOT REQUIRE GRANTING THE PETITION.

Petitioner's argument that his petition should be granted in order to insure the integrity of the judicial process in this and similar cases is a mixture of platitudes and broad factual claims. The essence of the argument appears to be that since he was treated unfairly and punished for encouraging compliance with the law by the military, his case should be an exception to the *Feres* rule of intra-military immunity.

Of course, if unfair, retaliatory treatment were a basis for an exception to the *Feres* rule, there would be no rule. The rule would simply disappear as an inquiry would need to be made in every case into the nature of the conduct of the alleged military tortfeasors in order to determine whether the conduct was such that a damage suit was authorized.

Bowen does not cite any authority for the integrity-of-the-system exception he advances. The petition should not be granted on this nebulous basis.

CONCLUSION

The decision by the court below applying the *Feres* bar to Bowen's suit for damages and equitable relief against the Alaska National Guard and its officers is consistent with this court's decisions on intra-military immunity and with the overwhelming weight of authority interpreting those decisions. No compelling reason has been advanced by petitioner for granting the petition. It should be denied.

Respectfully submitted this 22nd day of May 1998.

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